



August 3, 2001

Mr. J. Robert Giddings
The University of Texas System
Office of General Counsel
201 West Seventh Street
Austin, Texas 78701-2981

OR2001-3371

Dear Mr. Giddings:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150254.

The University of Texas Medical Branch at Galveston (the "university") received a request for "all records relating to [the requestor's] appeals, complaints, and grievances," all related university policies and procedures, and the tenure rules. You state that you will release some of the requested information to the requestor. You claim, however, that some of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note that the requestor has modified his request to exclude documents containing an attorney's legal advice or opinions. Therefore, this ruling will not address such information. However, as the requestor has not modified his request to exclude documents containing client confidences, this ruling will address such information.

Next, we note that portions of the submitted information are subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(a) Without limiting the amount or kind of information that is public information under this chapter, *the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:*

...

(8) a statement of the general course and method by which an agency's functions are channeled and determined, including the nature and requirements of all formal and informal policies and procedures[.]

Gov't Code § 552.022(a)(8) (emphasis added). Therefore, as prescribed by section 552.022, the submitted excerpts from the UTMB Handbook of Operating Procedures must be released to the requestor unless they are confidential under other law. Sections 552.103, 552.107, and 552.111 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and are therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 630 at 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107); Open Records Decision No. 473 (1987) (governmental body may waive section 552.111).² Therefore, the university may not withhold the submitted excerpts from the UTMB Handbook of Operating Procedures, which we have marked, under sections 552.103, 552.107 or 552.111 of the Government Code.

We now address your claimed exceptions with respect to the remaining submitted information. Section 552.103 of the Government Code provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

² You seem to contend that the submitted documents contain confidential attorney-client communications that are excepted from disclosure under section 552.101. We note, however, that in Open Records Decision No. 574 (1990), this office determined that the statutory predecessor to section 552.107(1) was the appropriate section for a governmental body to cite when seeking to except from required public disclosure communications between the governmental body and its legal counsel.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The university has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The university must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). This office has also concluded that litigation was reasonably anticipated when the potential opposing party filed a complaint with the Equal Employment Opportunity Commission. Open Records Decision No. 336 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You state that, prior to the university's receipt of the request, the requestor filed two complaints with the Texas Commission on Human Rights (the "TCHR") alleging discrimination. You have submitted copies of both of these complaints. The TCHR operates as a federal deferral agency under section 706(c) of title VII, 42 U.S.C. § 2000e-5. The Equal Employment Opportunity Commission ("EEOC") defers jurisdiction to the TCHR over complaints alleging employment discrimination. *Id.* By showing that the complaints filed with the TCHR are pending, you have shown that litigation is reasonably anticipated. Based on your comments and our review of the remaining submitted information, we also find that the university has demonstrated that most of the remaining information is related to the anticipated litigation for purposes of section 552.103(a). Thus, the university may withhold some of the remaining information pursuant to section 552.103(a).

We note, however, that much of the information for which you claim a section 552.103 exception has either been obtained from or provided to the opposing party in the anticipated litigation. Once the information has been obtained by all parties to the pending litigation,

no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). Accordingly, any documents obtained from or provided to the opposing party must be released. We also note that the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

Two of the remaining documents, however, do not appear on their face to relate to the anticipated litigation. Further, you have failed to indicate how these documents relate to the anticipated litigation. You assert, however, that these two documents are excepted under sections 552.107(1) and 552.111 of the Government Code. Section 552.107(1) excepts information "that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct[.]" While section 552.107(1) appears to apply to information within rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, this office has determined that section 552.107 cannot be applied as broadly as written to information in the possession of an attorney for a governmental body. Open Records Decision No. 574 (1990). Section 552.107(1) was found to protect only the attorney's communication of legal advice or opinion to the client and communications from a client to an attorney where those communications are made in confidence and in furtherance of the attorney rendering professional legal service to the governmental body. *Id.* at 5. Moreover, section 552.107(1) does not except purely factual information from disclosure. *Id.* We determine the applicability of section 552.107(1) on a case-by-case basis. We agree that one of these documents, which we have marked, reflects client confidences that the university may withhold under section 552.107.

Finally, a governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was (1) created for trial or in anticipation of civil litigation, and (2) consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery or release believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996) (citing *National Tank v. Brotherton*, 851 S.W.2d 193, 200 (Tex. 1993)). The second requirement that must be met is that the work product "consists of or tends to reveal the thought processes of an attorney in the civil litigation process." Open Records Decision No. 647 at 4 (1996). Although the attorney work product privilege protects information that reveals the mental processes, conclusions, and legal theories of the attorney, it generally does not extend to facts

obtained by the attorney. *See id.* (citing *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749, 750 n.2 (Tex. 1991)); *see also Leede Oil & Gas, Inc. v. McCorkle*, 789 S.W.2d 686 (Tex. App.-Houston [1st Dist.] 1990, no writ) (the attorney work product privilege does not protect memoranda prepared by an attorney that contain only a “neutral recital” of facts). We find that the document at issue here does not contain mental processes, conclusions, or legal theories. Therefore, this document is not protected by section 552.111 and the work product privilege. As this document is not excepted under sections 552.103, 552.107, or 552.111, it must be released. We have marked this document accordingly.

To summarize, we conclude that: (1) the university must release the submitted excerpts from the UTMB Handbook of Operating Procedures, which we have marked; (2) some of the submitted information, which we have marked, may be withheld under section 552.107(1); (3) some of the submitted information, which we have marked, may not be withheld under sections 552.103, 552.107, or 552.111 and must therefore be released; (4) some of the submitted documents, which we have marked, appear to have been obtained from or provided to the opposing party in the anticipated litigation and must therefore be released; and (5) assuming the opposing party has not had access to the remaining unmarked information, the university may withhold the unmarked information under section 552.103.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If

the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 150254

Enc: Submitted documents

c: Mr. Samuel Baron
2703 Frostwood Circle
Dickinson, Texas 77539
(w/o enclosures)